A

## ROSSARIN NUEKAEW v. PP

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
B
BALIA YUSOF WAHI FCJ
AZIAH ALI FCJ
[CRIMINAL APPEAL NO: 05-286-12-2015(K)]
14 AUGUST 2017

C ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Accused person charged and convicted for trafficking in 16,841g of cannabis – Offence under s. 39B(1)(a) of Dangerous Drugs Act 1952 – Accused person sentenced to death – Whether conviction and sentence safe*

D ***CRIMINAL PROCEDURE:*** *Statements – Witness statements – Application of s. 402B of Criminal Procedure Code – Whether written statement to be admitted as evidence in court must be read aloud at trial – Whether court could direct otherwise for written statement not to be read aloud at trial – Whether conditions to be complied with under sub-s. 402B(6) directory or mandatory – Whether non-compliance with conditions under sub-s. 402B(6) curable under s. 422 of*
E *Criminal Procedure Code*

Caught by the police for carrying 16,841g of cannabis in her bags, the appellant was charged and convicted at the High Court with the offence of trafficking in dangerous drugs, under s. 39B(1)(a) of the Dangerous Drugs Act
F 1952. The appellant was sentenced to death. The appellant's appeal to the Court of Appeal proved futile. Hence, the present appeal which concerned the application of s. 402B of the Criminal Procedure Code ('CPC') relating to the tendering of the written statement of the chemist ('SP1') by the respondent ('the prosecution'). It was submitted by the appellant that the High Court had not complied with the provisions of s. 402B of the CPC as
G SP1 did not read her written statement in open court under oath. The prosecution argued that the new s. 402B of the CPC was inserted to provide for speedy procedure in criminal trials. The issues raised for the court's adjudication were (i) whether the written statement to be admitted as evidence in court must be read aloud at the trial; (ii) whether the court could
H direct otherwise for the written statement not to be read aloud at the trial; (iii) whether the conditions to be complied with under sub-s. 402B(6) of the CPC directory or mandatory; and (iv) whether the non-compliance with the conditions under sub-s. 402B(6) curable under s. 422 of the CPC.

I

**Held (dismissing appeal)**
**Per Zulkefli Ahmad Makinudin PCA delivering the judgment of the court:**

**(1)** The new s. 402B of the CPC provides for a witness to give evidence by way of a witness statement. The substitution of oral evidence with that of a written statement enables the parties to tender the witness statement as evidence during cross-examination-in-chief. This would save the court's time in recording the evidence. Section 402B allows for proof by written statement of any witness subject to the conditions set out in s. 402B(2)(a), (b) and (c), namely (i) the witness statement must be signed by the maker; (ii) the witness statement contains a declaration by the maker that the statements made in the witness statement are true to the best of his knowledge and belief; and (iii) a copy of the witness statement is served by or on behalf of the party proposing to tender it on each of the parties to the proceedings not later than 14 days prior to the trial unless the parties otherwise agree. (paras 8 & 9)

**(2)** From the wording of sub-s. 402B(6) of the CPC, it is clear that so much of the witness statement to be admitted in evidence must be read aloud at the trial. However, this prerequisite is not to be applied across the board and without exception. Under this sub-section, there is an exception to this general rule. The exception is expressed in the use of the words 'unless the court otherwise directs' which means that the court could dispense with the requirement for the witness statement to be read aloud if the court finds it appropriate to do so. This is to avoid an unnecessarily lengthy reading of such statement in the court and so as not to defeat the purpose of the insertion of s. 402B into the CPC. The requirement to read aloud the witness statement under sub-s. 402B(6) of the CPC is only directory and not mandatory. (paras 17, 19 & 25)

**(3)** The witness statement of SP1 was properly admitted under s. 402B of the CPC as (i) SP1 had signed the statement; (ii) it contained a declaration by SP1 that the statement was true to the best of her knowledge and belief; and (iii) the appellant had no objection and agreed during the proceeding for the statement to be tendered in the court, as reflected in the court recording and transcription. Even if the witness statement was improperly admitted due to the omission of reading the statement aloud during the trial, it had not occasioned a failure of justice. The appellant had the opportunity to challenge SP1's evidence and the latter was under oath at all times. The procedural non-compliance of sub-s. 402B(6) of the CPC was merely an irregularity and not an illegality and was curable under s. 422 of the CPC. The appellant could not be said to have been denied a fair trial. (paras 10 & 30)

A ***Bahasa Malaysia*** *Headnotes*

Berikutan tangkapan oleh pihak polis kerana membawa beg-beg berisi 16,841g kanabis, perayu dipertuduh dan disabitkan di Mahkamah Tinggi atas pertuduhan mengedar dadah berbahaya, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu dijatuhkan hukuman mati dan gagal
B dalam rayuannya di Mahkamah Rayuan. Maka timbul rayuan ini berkenaan pemakaian s. 402B Kanun Tatacara Jenayah ('KTJ'), khususnya pengemukaan pernyataan bertulis ahli kimia ('SP1') oleh responden ('pihak pendakwaan'). Perayu menghujahkan bahawa Mahkamah Tinggi tidak mematuhi peruntukan-peruntukan s. 402B KTJ kerana SP1 tidak
C membaca pernyataan bertulisnya dalam mahkamah terbuka secara bersumpah. Pihak pendakwaan menghujahkan s. 402B KTJ yang baharu dimasukkan untuk mencepatkan tatacara dalam perbicaraan jenayah. Isu-isu yang dibangkitkan untuk pertimbangan mahkamah adalah (i) sama ada pernyataan bertulis yang hendak dikemukakan di mahkamah mesti dibaca
D dengan kuat semasa perbicaraan; (ii) sama ada mahkamah boleh, sebaliknya, mengarahkan agar pernyataan bertulis tidak dibaca dengan kuat semasa perbicaraan; (iii) sama ada syarat-syarat yang perlu dipatuhi bawah sub-s. 402B(6) KTJ satu panduan atau wajib dipatuhi; dan (iv) sama ada ketakpatuhan syarat-syarat bawah sub-s. 402B(6) boleh diremedi oleh s. 422
E KTJ.

**Diputuskan (menolak rayuan)**
**Oleh Zulkefli Ahmad Makinudin PMR menyampaikan penghakiman mahkamah:**

F **(1)** Seksyen 402B KTJ yang baharu memperuntukkan agar saksi memberi keterangan melalui pernyataan saksi. Penggantian keterangan lisan dengan pernyataan bertulis membolehkan pihak-pihak mengemukakan pernyataan saksi sebagai keterangan semasa pemeriksaan balas utama. Ini menjimatkan masa mahkamah dalam merekodkan keterangan. Seksyen 402B membenarkan bukti pernyataan bertulis mana-mana saksi
G tertakluk pada syarat-syarat yang dinyatakan dalam s. 402B(2)(a), (b) dan (c) iaitu (i) pernyataan saksi mesti ditandatangani oleh pembuatnya; (ii) pernyataan saksi mengandungi pengisytiharan oleh pembuatnya bahawa pernyataan-pernyataan dalam pernyataan saksi tersebut benar setakat yang diketahui dan dipercayainya; dan (iii) sesalinan pernyataan
H saksi diserahkan oleh atau mewakili pihak yang bercadang mengemukakannya kepada pihak-pihak dalam prosiding tidak lebih 14 hari sebelum perbicaraan melainkan pihak-pihak bersetuju sebaliknya.

I **(2)** Berdasarkan sub-s. 402B(6) KTJ, jelas kebanyakan pernyataan saksi yang diterima masuk sebagai keterangan mesti dibaca dengan kuat semasa perbicaraan. Walau bagaimanapun, prasyarat ini tidak terpakai meluas dan bukan tanpa pengecualian. Bawah sub-seksyen ini, terdapat pengecualian peraturan am. Pengecualian ini dinyatakan melalui

penggunaan perkataan-perkataan 'unless the court otherwise directs' yang bermaksud mahkamah boleh mengetepikan syarat agar pernyataan saksi dibaca dengan kuat jika mahkamah berpendapat sesuai berbuat demikian. Ini bagi mengelakkan bacaan panjang berjela pernyataan tersebut di dalam mahkamah dan untuk menjayakan tujuan pemasukan s. 402B KTJ. Syarat membaca pernyataan saksi bawah sub-s. 402B(6) KTJ hanya satu panduan dan tidak wajib.

**(3)** Pernyataan saksi SP1 diterima masuk dengan teratur bawah s. 402B KTJ kerana (i) SP1 telah menandatangani pernyataan tersebut; (ii) pernyataan tersebut mengandungi pengisytiharan oleh SP1 bahawa pernyataan yang dibuat benar setakat yang diketahui dan dipercayainya; dan (iii) perayu tidak mempunyai bantahan dan bersetuju semasa prosiding agar pernyataan dikemukakan di dalam mahkamah dan ini tercermin dalam rekod dan transkripsi mahkamah. Jika pun pernyataan saksi tersebut tidak diterima masuk dengan teratur susulan ketinggalan bacaan pernyataan tersebut dengan kuat, ini tidak menyebabkan ketidakadilan. Perayu berpeluang mencabar keterangan SP1 dan SP1 bersumpah pada setiap masa. Ketakpatuhan tatacara sub-s. 402B(6) KTJ sekadar satu ketakteraturan dan bukan ketaksahan dan boleh diremedi oleh s. 422 KTJ. Perayu tidak boleh dikatakan dinafikan perbicaraan yang adil.

**Case(s) referred to:**

*Abuchi Ngwoke v. PP [2016] 5 CLJ 1 CA* ***(refd)***
*Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC* ***(refd)***
*Darumalingam Sinniah v. Asian Shield Warehousing Sdn Bhd [2015] 8 CLJ 360 CA* ***(refd)***
*Fauzi Naim Muhamad Zaki v. PP (Criminal Appeal No: 05-253-11-2015(K) (Unreported)* ***(refd)***
*Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC* ***(refd)***
*Mahdi Keramatviyarsagh Khodavirdi v. PP [2015] 3 CLJ 336 CA* ***(refd)***
*PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 CA* ***(refd)***

**Legislation referred to:**

Criminal Procedure Code, ss. 402B(2)(a), (b), (c), (6), 422
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2)
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 35A r. 1

*For the appellant - Mohd Ridzuan Muhamad; M/s Mohd Fadzli & Co*
*For the respondent - Tetralina Ahmed Fauzi; DPP*

*[Editor's note: For the Court of Appeal judgment, please see Rossarin Nuekaew v. PP [2016] 1 LNS 182 (affirmed).]*

*Reported by Najib Tamby*

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## JUDGMENT

**Zulkefli Ahmad Makinudin PCA:**

**[1]** The appellant was charged before the High Court at Alor Setar in the State of Kedah with an offence under s. 39B(1)(a) of the Dangerous Drugs
B Act 1952 ('the Act') for trafficking in 16,841g of cannabis ('the said drugs'), an offence punishable under sub-s. 39B(2) of the same Act. The appellant was tried and convicted by the High Court on the charge and sentenced to death. The appellant's appeal to the Court of Appeal was heard and dismissed. The appellant now appeals to this court against the decision of the Court of
C Appeal in dismissing her appeal.

**[2]** The relevant facts of the prosecution's case are as follows:

> On 9 December 2011, about 7pm, Inspector Samsualan bin Samsudin (SP2) received information of drug trafficking by a foreign national in the vicinity of the Shabab Perdana Bus Terminal in Alor Setar. Based
D on the said information, SP2 led a raiding party to the said bus terminal. Whilst carrying out observation at the bus terminal, about 8pm, SP2 noticed the appellant walking along lane six of the said bus terminal. She was carrying one bag in each hand (P29 and P30) and had a handbag (P31) slung over her right shoulder. SP2 and his party then proceeded
E to approach the appellant and detained her. SP2 identified to the appellant that he and his party were police officers from the narcotics division. The appellant appeared to be "cemas dan resah" according to SP2 whereupon she immediately dropped the two bags P29 and P30 to the floor. SP2 found the said two bags to be locked and ordered the
F appellant to open the bags. At first, the appellant refused but when instructed again to do so she produced a set of keys (P33A-E) from her handbag (P31) and proceeded to open the two bags with the keys. SP2 then examined the contents of the two bags. Inside bag P29, SP2 found 8 slabs of compressed dried leaves (P10A-P17A). Inside bag P30, he
G found ten slabs of compressed dried leaves (P19A-P28A). SP2 suspected the slabs of compressed dried leaves to be cannabis. The appellant was arrested and the said exhibits were sent to the Chemistry Department for analysis. Upon analysis by the chemist, Norleen binti Abdul Manaf (SP1), the dried leaves in the 18 slabs were confirmed to be cannabis as defined in s. 2 of the Act.

H

**[3]** After evaluating all the evidence presented before the court, the learned trial judge at the conclusion of the trial held that the prosecution had proven its case beyond reasonable doubt, and convicted the appellant.

**[4]** On appeal to the Court of Appeal, the Court of Appeal unanimously
I held, on the totality of the evidence adduced, that the conviction by the trial court was safe as the evidence was cogent. As such, the appeal was dismissed and the conviction and sentence were affirmed.

**[5]** The appellant in her petition of appeal before this court advanced several grounds of appeal. However, at the outset of the hearing before us, learned counsel for the appellant raised as a ground of appeal pertinent issues on the application of s. 402B of the Criminal Procedure Code ('the CPC') relating to the tendering of the written statement of the chemist (SP1) by the prosecution in this case. The issues raised can be categorised as follows:

(i) whether the written statement to be admitted as evidence in court must be read aloud at the trial;

(ii) whether the court can direct otherwise for the written statement not to be read aloud at the trial;

(iii) whether the conditions to be complied with under sub-s. 402B(6) of the CPC is directory or mandatory; and

(iv) whether the noncompliance with the conditions under sub-s. 402B(6) of the CPC is curable under s. 422 CPC.

**[6]** Learned counsel for the appellant submitted that the trial court had not complied with the provisions of s. 402B of the CPC as SP1 did not read her written statement in open court under oath. This, according to learned counsel, was against the principles laid down in the case of *Abuchi Ngwoke v. PP* [2016] 5 CLJ 1 where it was held that failure on the part of the chemist to read a written statement in open court under oath is fatal to the prosecution's case resulting in her evidence becoming inadmissible. As a result, the subject matter of the charge, the cannabis, was not proved by the prosecution. On this ground alone, it is the contention of learned counsel for the appellant that the appellant should be acquitted and discharged on the charge as framed against her.

**[7]** On the other hand, learned Deputy Public Prosecutor ("the DPP") submitted that the new s. 402B of the CPC was inserted to provide for speedy procedure in criminal trials. This is to ensure that the right of the accused was not prejudiced by lengthy procedures.

**[8]** The new s. 402B of the CPC provides for a witness to give evidence by way of a witness statement. The maker of the statement who is called as a witness may only be examined, cross-examined and re-examined orally in two situations. Firstly, where he is required to give additional evidence. Secondly, where he is requested by the other side to be cross-examined. The substitution of oral evidence with that of a written statement enables the parties to tender the witness statement as evidence during examination-in-chief. This in itself would save the court's time in recording the evidence. For easy reference, we reproduce below in full the provisions of s. 402B of the CPC:

Proof by written statement,

402B. (1) In any criminal proceedings, a written statement by any person shall, with the consent of the parties to the proceedings and subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) A statement may be tendered in evidence under subsection (1) if

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief; and

(c) a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings not later than fourteen days before the commencement of the trial unless the parties otherwise agree.

(3) Notwithstanding paragraph (2)(c), a party proposing to tender a statement in evidence under subsection (1) may not serve the statement to any other parties to the proceedings where the parties to the proceedings agree before or during the proceedings that the statement shall be so tendered.

(4) If a statement proposed to be tendered in evidence under subsection (1):

(a) is made by a person who cannot read, the statement shall be read and explained to him before he signs it and the statement shall be accompanied by a statutory declaration made under the Statutory Declarations Act 1960 [Act 13] by the person who so read the statement to the effect that it was so read and explained; or

(b) refers to any other document or object as an exhibit, the copy served on any other party to the proceedings under paragraph (2)(c) shall be accompanied by a copy of that document or by a photograph of the object and such information as may be necessary in order to enable the party on whom it is served to inspect the document or object, as the case may be, unless it is not expedient to do so.

(5) Notwithstanding that the written statement of a person may be admissible as evidence by virtue of this section:

(a) the party by whom or on whose behalf a copy of the statement was served may call the person making the statement to give additional evidence which may include matters which are not contained in the statement; and

(b) the maker of the statement shall attend the trial for cross-examination and re-examination, if so requested.

(6) So much of any statement as is admitted in evidence by virtue of this section shall, unless the Court otherwise directs, be read aloud at the trial and where the Court so directs an account shall be given orally of so much of any statement as is not read aloud.

(7) Any document or object referred to as an exhibit and identified in a written statement admitted in evidence under this section shall be treated as if it was produced as an exhibit and identified in the Court by the maker of the statement.

(8) A document required by this section to be served on any person may be served:

(a) by delivering the document to the person himself or to his advocate; or

(b) in the case of a corporation, by delivering the document to the secretary or other like officer of the corporation at its registered or principal office or by sending the document by registered post addressed to the secretary or other like officer of the corporation at that office.

**[9]** It is to be noted that s. 402B of the CPC allows for proof by written statement of any witness subject to the conditions as set out in paras. (a), (b) and (c) of sub-s. 402B(2) of the CPC. The conditions are as follows:

(i) the witness statement must be signed by the maker;

(ii) the witness statement contains a declaration by the maker that the statements made in the witness statement are true to the best of his knowledge and belief; and

(iii) a copy of the witness statement is served by or on behalf of the party proposing to tender it on each of the other parties to the proceedings not later than 14 days prior to the trial unless the parties otherwise agree.

**[10]** Having perused the witness statement of SP1, we are of the view that the witness statement was properly admitted under s. 402B of the CPC for the following reasons:

(a) SP1 had signed the statement;

(b) It contained a declaration by SP1 that the statement is true to the best of her knowledge and belief; and

(c) The appellant had no objection and agreed during the proceeding for the statement to be tendered in court as reflected in the court recording and transcription ('CRT').

**[11]** Learned DPP conceded that the only non-compliance with the provision of s. 402B of the CPC was that the written statement was not read aloud at the trial as provided for in sub-s. 402B(6) of the CPC. However, learned DPP submitted that the conditions to be complied with under the said subsection was only directory and not mandatory as no failure of justice occasioned by the omission to follow the strict procedure laid down in that subsection. This according to learned DPP was curable by applying the provisions of s. 422 of the CPC.

**[12]** Learned DPP in support of her contention cited the recent unreported judgment of this court in the case of *Fauzi Naim Muhamad Zaki v. Public Prosecutor* (Criminal Appeal No: 05-253-11-2015(K)) whereby this issue has been raised and dealt with by the court. This court held that the non-compliance with the provisions of sub-s. 402B(6) of the CPC did not render the whole proceeding a nullity. The conditions to be complied with under the said subsection are only directory and not mandatory.

**[13]** We are of the view that from a proper reading of sub-s. 402B(6) of the CPC, that subsection does not require the witness statement to be read aloud in court in every situation. The court can direct that only a portion of the witness statement to be read or not at all.

**[14]** In order to appreciate and interpret the provisions of sub-s. 402B(6) of the CPC, it is essential for us to look at the legislative history of the insertion of the new s. 402B into the CPC. The Criminal Procedure Code (Amendment) Act 2010 (Act A1378) provides for the insertion of s. 402B into Chapter XXXIX of the CPC. Act A1378 received royal assent on 2 June 2010 and was published in the *Gazette* on 10 June 2010. The explanatory statement of the Criminal Procedure Code (Amendment) Bill 2010 ('the Bill') states as follows:

> Clause 8 seeks to introduce two new sections, namely sections 402B and 402C, into Act 593. The new section 402B seeks to facilitate the substitution of oral evidence with that of written statements. This process will enable the Public Prosecutor and the defence to tender statements in the form of evidence during examination-in-chief. This will save the Court's time in recording evidence as the statements will have effect as though the evidence were oral evidence given in open court and any exhibits tendered by virtue of this section is tendered as though tendered in the normal course of trial.

**[15]** At the second reading of the Bill in the House of Representatives, YB Datuk Liew Vui Keong (the then Deputy Minister in the Prime Minister's Department) explained that the purpose of inserting s. 402B was to ensure that there was a speedy trial, taking into account the huge backlog of criminal cases pending in court at the material time. The relevant excerpt of the Hansard is produced in the Malay language as follows:

> Tuan Yang di-Pertua, sehingga ke hari ini peningkatan kes jenayah di mahkamah di negara ini adalah begitu mendadak. Berikutan itu terdapat banyak kes yang tertunggak di Mahkamah Jenayah dan ini boleh menjejaskan pentadbiran keadilan di Malaysia. Di bawah "Common Law" adalah menjadi prinsip asas bahawa keadilan yang dilengah-lengahkan adalah keadilan yang dinafikan dengan dengan izin, "justice delayed is justice denied". Perbicaraan yang terlalu lama bagi sesuatu kes jenayah akan menjejaskan hak individu yang dituduh dan seterusnya menjejaskan keterangan yang menjadi dasar bagi membuktikan sesuatu penghakiman. Kerajaan memandang serius perkara ini.

Tuan Yang di-Pertua, kerajaaan telah mengkaji sebab-sebab yang boleh melambatkan perbicaraan kes jenayah dan mencari jalan supaya proses pendakwaan dan perbicaraan kes-kes tersebut boleh disegerakan. Sehubungan dengan itu kerajaan telah mencadangkan supaya sistem "speedy trial" dilaksanakan di Malaysia. Konsep "speedy trial" bukanlah satu konsep yang baru, tetapi telah diamalkan di kebanyakan negara di dunia ...

...

... Sistem "speedy trial" ini bertujuan untuk memastikan kes-kes jenayah di mahkamah dapat diselesaikan dengan secepat mungkin dan untuk memastikan kes-kes jenayah tidak tertunggak untuk tempoh yang terlalu lama, sehingga menyebabkan pihak-pihak yang terlibat dalam proses pentadbiran keadilan jenayah dicabar sama ada di peringkat domestik ataupun antarabangsa. Tuan Yang di-Pertua kerajaan telah mengkaji sama ada suatu perundangan yang khusus perlu diubah atau memadai untuk meminda perundangan yang sedia ada untuk memperuntukkan mengenai konsep "speedy trial" dan perkara-perkara yang berkaitan dengannya ...

... Kelima, fasal 8 bertujuan untuk memasukkan dua seksyen baru iaitu seksyen 402B dan 402C ke dalam Akta 593. Seksyen baru 402B bertujuan untuk memudahkan penggantian keterangan berbentuk lisan dengan keterangan berbentuk pernyataan bertulis. Proses ini membolehkan pendakwa raya dan pihak pembelaan mengemukakan pernyataan dalam bentuk keterangan semasa pemeriksaan utama. Kemudahan ini akan menjimatkan masa Mahkamah dalam perekodan keterangan kerana pernyataan itu akan mempunyai kesan seolah-olah keterangan itu salah. Maaf, keterangan itu adalah keterangan lisan yang diberikan semasa mahkamah terbuka dan apa-apa exhibit yang dikemukakan menurut kuasa seksyen ini dikemukakan seolah-olah dikemukakan dalam perjalanan biasa perbicaraan.

**[16]** From the excerpt of the Hansard above, we can conclude that the purpose of the insertion of the new s. 402B into the CPC was to provide for a speedy disposal of criminal cases. This is to ensure that the conduct of the case by the prosecution and the rights of the accused person are not affected by lengthy procedures and protracted trial. We would state here that in construing a statute a reference to Parliamentary report of proceedings or Hansard is permitted as an aid to statutory interpretation where the enactment is ambiguous, obscure or which if literally construed might lead to an absurdity, provided that the statement reported in the Hansard was made by a Minister or the promoter of a Bill. (See the case of *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345)

*Whether The Witness Statement To Be Admitted As Evidence In Court Must Be Read Aloud At The Trial?*

**[17]** We are of the view that from the wording of sub-s. 402B(6) of the CPC, it is clear that so much of the witness statement to be admitted in evidence must be read aloud at the trial. However, this prerequisite is not to be applied across the board and without exception. Under this subsection, there is an exception to this general rule. The exception is expressed in the use of the words "unless the court otherwise directs", which means that the court can dispense with the requirement for the witness statement to be read aloud if the court finds it appropriate to do so.

**[18]** We would like to distinguish the case before us from the case of *Abuchi Ngwoke v. PP (supra)* cited by learned counsel for the appellant which followed the decision of *Mahdi Keramatviyarsagh Khodavirdi v. PP* [2015] 3 CLJ 336. In both these cases, the witness statement was not read. It did not bear the signature of the witness. The witness statement also did not contain a declaration as required under para. (2)(b) of s. 402B of the CPC and not marked as an exhibit by the court. The court in both the cases cited the non-compliance with the requirements as laid down in s. 402B as the reasons for acquitting and discharging the accused person. By contrast, in our case, all the requirements in s. 402B have been complied with *albeit* the statement was not read aloud in court.

**[19]** We are of the view that the court can use its discretion when it considers appropriate and with the concurrence of all parties, to dispense with the requirement that the witness statement must be read aloud. This is to avoid an unnecessary lengthy reading of such statement in court and so as not to defeat the purpose of the insertion of s. 402B into the CPC, which is to provide a speedy disposal of criminal cases. On this point, learned counsel for the appellant referred to us the case of *Darumalingam Sinniah v. Asian Shield Warehousing Sdn Bhd* [2015] 8 CLJ 360, where Mohd Hishamudin Yunus JCA held that the exception in the old O. 35A r. 1 of the Rules of the High Court 1980 ('RHC 1980'), which is in *pari materia* with the exception in sub-s. 402B(6) of the CPC, is not applicable to dispense with the reading aloud of the witness statement. His Lordship, *inter alia*, had this to say:

> … we do not think that the learned Judicial Commissioner could make such an order that would be contrary to the spirit of the provision; except, perhaps, in exceptional circumstances, where for example, there is medical evidence that a particular witness unable to speak at the trial.

**[20]** With respect, we cannot agree with the views expressed by Mohd Hishamuddin Yunus JCA as relied on by learned counsel for the appellant on the application of sub-s. 402B(6) of the CPC that there is a restriction to limit that exception to only medical reasons. In our view, the court can on its own discretion decide when and to what extent this exception is to be applied, bearing in mind the purpose or object behind the insertion of s. 402B into the CPC.

**[21]** It is also to be noted that the exception in O. 35A r. 1 of the RHC 1980 has not been incorporated into the new Rules of Court ('ROC 2012'). A

*Whether The Requirements Under s. 402B(6) Of The CPC Is Directory Or Mandatory?*

**[22]** We shall now deal with the question as to whether the requirements of sub-s. 402B(6) of the CPC as regards the reading aloud of a witness statement is directory or mandatory. B

**[23]** A useful reference may be made to the case of *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360 in determining whether a particular provision of the CPC is mandatory or directory. In this case, the applicant was granted leave to refer the following questions of law of public interest to the Supreme Court: C

(a) Where in the course of trial a charge is amended, is it mandatory to read and explain the amended charge to an accused person pursuant to the provision of sub-s. 158(ii) of the CPC; and D

(b) If the answer to (a) is in the affirmative, then is the omission to read and explain the amended charge to an accused person a mere irregularity which can be cured by recourse to s. 422 of the CPC.

**[24]** The relevant excerpt of the judgment in the case of *Hee Nyuk Fook* in which this issue was explained is reproduced as follows: E

> The question that arises is whether section 158(ii) is mandatory or directory. In our view, the word "shall" appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (see *Interpretation of Statutes* by Bindra, 7th Ed., p. 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory (see *Howard v. Bodington* (1877) 2 PD 203 at p 211). F G

**[25]** Applying the test and the principle laid down in *Hee Nyuk Foo*k, it is our judgment that the requirement to read aloud the witness statement under sub-s. 402B(6) of the CPC is only directory and not mandatory. In coming to this conclusion, we have considered the subject matter of the case which was in relation to the admissibility of evidence by way of witness statement of the chemist ('SP1'). The witness statement was prepared by the maker by signing the witness statement to show that the statement made by the maker was based on truth and to his knowledge. The witness statement was duly served on the other party. We also noted from the records of the proceedings of the trial court that the appellant had also agreed and had no objection to the tendering of the statement during the proceedings. H I

**[26]** To further support our view that the application of sub-s. 402B(6) of the CPC is merely directory, we would refer to the provision of s. 17A of the Interpretation Acts 1948 and 1967 (Act 388) ("the Interpretation Acts"). Section 17A of the Interpretation Acts provides:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object

**[27]** We are of the considered view that based on the purpose or object of the insertion of the new s. 402B into the CPC as shown through the explanatory statement of the Bill and the Hansard and applying the principle as laid down in s. 17A of the Interpretation Acts, the requirement to read aloud the witness statement of the chemist (SP1) is not mandatory and it can be dispensed with if the court finds it appropriate to do so and it is satisfied that no failure of justice will be occasioned by such dispensation.

*Whether The Non-compliance Of Conditions Under Sub-s. 402B(6) Of The CPC Is Curable Under s. 422 Of The CPC?*

**[28]** Section 422 of the CPC, *inter alia*, provides that any finding, sentence or order passed or made by a court of competent jurisdiction cannot be reversed or altered on the basis of an error, omission, irregularity, want of sanction, or improper admission or rejection of evidence unless it has occasioned a failure of justice.

**[29]** It is pertinent to first consider the meaning and extent of the application of the term "failure of justice". The case of *PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843 explained that "failure of justice" in s. 422 of CPC occurred when the accused was denied a fair trial. The judgment of the Court of Appeal at p. 860 reads as follows:

> In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answer to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no prejudice and failure of justice. If the answers are in the negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused.

**[30]** We are of the view even assuming that the witness statement was improperly admitted due to the omission of reading the statement aloud during the trial, it nevertheless had not occasioned a failure of justice. Our view is fortified by the argument that the witness statement of SP1 contained a declaration and was signed by SP1. The statement was tendered with the agreement of the appellant during the proceedings. The defence had the

opportunity to challenge SP1's evidence and SP1 was under oath at all times. The procedural non-compliance of sub-s. 402B(6) of the CPC is merely an irregularity and not an illegality and is curable under s. 422 of the CPC. The appellant cannot be said in the circumstances of the case to have been denied a fair trial.

**[31]** As to the other grounds of appeal advanced by the appellant, we have duly considered the submissions of learned counsel for the appellant and learned DPP and we found them to be of no merit.

**[32]** For the reasons above-stated, we find that the conviction of the appellant is safe. Having considered all the evidence before the High Court until the conclusion of the trial, we are satisfied that the prosecution has proven its case beyond reasonable doubt. We dismiss this appeal. The conviction and sentence passed by the High Court and affirmed by the Court of Appeal are affirmed.